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In The

Supreme Court of the United States

October Term, 1989

GAETANO VASTOLA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of
Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER

HERALD PRICE FAHRINGER
Counsel of Record
DIARMUID WHITE
LIPSITZ, GREEN, FAHRINGER,
ROLL, SCHULLER & JAMES
540 Madison Avenue
New York, NY 10022
(212) 751-1330

Attorneys for Petitioner

Of Counsel

MICHAEL ROSEN
JOY VASTOLA

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This reply is submitted primarily to address the Government's startling suggestion that the petition for a writ of certiorari be granted only as to the first question presented, and the case remanded for further consideration in light of *United States v. Rios*, No. 89-61 (Apr. 30, 1990), but that the petition not be granted as to the second question presented, even though the court of appeals' resolution of that question is also undermined by *Rios*. The Government's brief, in asserting that the second

question is not governed by 18 U.S.C. § 2518(8)(a), misleadingly omits that the court of appeals rejected that very contention and held that it was.

1. The Government concedes that *Rios* rejects the analysis used by the courts below in resolving the first question presented. (Brf. 8) That analysis was based on *United States v. Falcone*, 505 F.2d 478 (3d Cir. 1974), which held that a delay in sealing tape recordings, in violation of 18 U.S.C. § 2518(8)(a), is not sufficient reason to suppress them so long as the integrity of the tapes is preserved. *Rios* expressly disagreed with the *Falcone* holding. (Slip op. 15 n. 5.)

2. In resolving the second question presented by Petitioner, the courts below employed the same analysis. Although that question did not involve a delay in sealing, but rather the unauthorized release of the original tapes[1] to a private individual in violation of unsealing orders, the court of appeals, in a lengthy discussion, determined that 18 U.S.C. § 2518(8)(a) governed the issue. (Pet. App. 65-71) The court of appeals expressly rejected the argument renewed by the Government here that "the consequences of an unauthorized transfer of custody to a third party is not governed by 18 U.S.C. 2518(8)(a)." (Brf. 9)

Citing *United States v. Falcone*, however, the court of appeals held that, notwithstanding the Government's infraction of the custody requirements of the unsealing

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[1] The Government's characterization of these tapes as an "identical set of original tapes" (Brf. 4, 9) is nonsensical. The tapes given to the private individual were *the* original tapes. The Government retained a *copy* of these tapes. There was only one set of original tapes.

orders, the tapes would not be suppressed without proof of tampering. (Pet. App. 71-73) The court expressly noted, but declined to follow, the holding of the United States Court of Appeals for the Second Circuit in *Rios*, 875 F.2d 17, 23 (1989), that suppression is required for unsatisfactorily explained sealing delays even absent proof of tampering, on which holding Petitioner relied and with which holding this Court ultimately agreed. (Pet. App. 72)

Obviously, then, the Government's contention here that "[t]he statutory analysis of the Court in *Rios* is inapplicable to the question whether the tape recordings should be suppressed because they were provided to a private party without court authorization after the courts ordered them unsealed" (Brf. 9) is incorrect. In view of the court of appeals' analyses and holdings, it would be anomalous – and surely dismaying to that court – to remand the case for reconsideration of the first question, but not the second, in light of *Rios*.

3. As to the remaining questions presented in the petition, Petitioner relies on the arguments made therein.